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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CELLPHONE FEE TERMINATION CASES.	A124038 A124048 (Alameda County Super. Ct. No. RG04-137699, JCCP No. 4332)

This is a consolidated appeal in one of several coordinated class actions that challenge wireless telephone carriers' imposition of early termination fees (ETF's) on customers seeking to cancel cellular telephone contracts. The defendant/respondent in this proceeding is Cellco Partnership doing business as Verizon Wireless (Verizon). The case against Verizon (*White v. Cellco Partnership* (RG04-137699) (*White*)) proceeded to jury trial on June 16, 2008, in the Alameda County Superior Court on the claims of California class members. On July 8, 2008, after plaintiffs/respondents[1] had rested their case and the defense presentation had commenced, the parties advised the court that they had signed a memorandum of understanding outlining the terms of settlement. The settlement also encompassed claims of nationwide certified class claimants (excluding California class members) in a proceeding then pending before the American Arbitration Association (AAA), as well as two actions filed in federal district courts.

[1] Plaintiffs/respondents are Molly White, Christina Nguyen, Patricia Brown and Harold Schroer and are collectively referred to as "plaintiffs."

The terms of the settlement required Verizon to provide a common fund of $21 million, from which all legal fees and costs, including notice and administrative costs, would be paid and from which class members who had actually paid or had been assessed an ETF would be reimbursed, with pro rata reduction, if required, based on the number of claimants. The trial court granted preliminary approval on July 11, 2008. At a noticed hearing on November 6, 2008, appellants[2] objected to final approval, contending that notice of the settlement was inadequate, and that the settlement terms were not fair, reasonable and adequate. Appellants further challenge the propriety of incentive payments awarded to four named class representatives. The trial court approved the settlement. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Verizon is a national cellular telephone service provider. In common with a number of other providers, Verizon charged ETF's to subscribers who cancelled service agreements prior to the scheduled termination dates. Verizon charged a flat fee of $175, regardless of when the cancellation occurred in the contract term.

Plaintiffs in the underlying case initially filed suit on July 23, 2003, in Alameda County against Verizon and six other cellular service providers alleging that the ETF's violated California consumer protection laws, and constituted unauthorized penalties under Civil Code section 1671.[3] (*Marlowe v. AT&T Corporation* (Super. Ct. Alameda County, complaint filed 2003, No. RG03-108118).) This action and others were coordinated under Judicial Council order (Code Civ. Proc., § 404.3; Cal. Rules of Court,

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[2] We refer to Dawn Zobrist and Danie van den Berg (objectors/appellants in appeal No. A124038) and Ann and John Talley (objectors/appellants in appeal No. 124048) collectively as "appellants."

[3] In addition to the ETF claims, plaintiffs alleged other unfair business practices by the named defendants, including handset locking policies and deposit requirements. (*Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 575, fn. 1 (*Gatton*).) The trial court divided the coordinated proceedings into these three substantive topics. (*Ibid*.)

rule 3.524)[4] before Judge Ronald Sabraw in the Alameda County Superior Court as the *Cellphone Termination Fee Cases* (JCCP No. 4332).) (*Gatton, supra,* 152 Cal.App.4th at p. 575, fn. 1.)

Pursuant to case management orders in the coordination proceedings, the ETF claims against Verizon were separately pled in a consolidated amended complaint in *White*. On June 9, 2006, Judge Ronald Sabraw certified a class in that action and in related cases defined as: " 'All persons who (1) had a wireless telephone personal account with [Verizon] with a California area code and a California billing address[] who (2) cancelled the account at any time from July 23, 1999, through [March 18, 2007], and (3) were charged an early termination fee in connection with that cancellation.' "[5] The class certification was "expressly predicated" on an "aggregate approach to monetary relief and the related setoff and cross-claim issues." Thus, if the ETF's were found to be illegal and unenforceable, the wireless carriers would still potentially be entitled to offset against any class recovery for their actual damages in the form of lost profits.[6]

By orders dated April 4, 2008, and May 12, 2008, the Superior Court severed the case against Verizon (and against Sprint) from the coordinated proceeding for purposes

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[4] All further rule references are to the California Rules of Court.

[5] Judge Ronald Sabraw initially declined to certify a class consisting of current subscribers. That portion of his order was reversed by this court. (*Cellphone Termination Fee Cases* (June 9, 2008, A115457) [nonpub. opn.].)

[6] In a December 27, 2006 pretrial order, Judge Ronald Sabraw described the trial procedure as follows: ". . . The Court will permit Plaintiffs to present aggregate damage calculations for the claims of the entire class and will require the trier of fact to state the damages owed to the members of the Plaintiff class in the aggregate. The Court will also permit Defendants to present aggregate damage calculations for their cross-claims against the entire class and will require the trier of fact to state the damages that the members of the Plaintiff class might owe to Defendants. The Court will then set off the two numbers. If the net amount owed is a positive for Plaintiffs, then the Court will enter judgment in favor of the Plaintiff class for that amount. *If the net amount owed is zero or a negative for the Plaintiffs, then the Court will enter judgment of zero in favor of the Plaintiff class*. Defendants will not be permitted to recover money from the Plaintiff/Cross-Defendant class." (Fn. omitted.)

of trial. Trial in the *White* case commenced on June 16, 2008, before Judge Bonnie Sabraw, shortly following a June 12, 2008 jury verdict in the *Sprint* case. Plaintiffs rested their case on July 2, 2008. A settlement in principle was reached by the parties on July 8, 2008. The trial judge granted preliminary approval of the proposed settlement on July 11, 2008.[7]

The Settlement Classes

The preliminary approval order certified two settlement classes, an " 'ETF Assessed Class,' " encompassing all Verizon contract customers in the United States who were billed a flat-rate ETF by Verizon Wireless and/or its legacy companies from July 23, 1999, until the effective date of the publication notice, whether or not any portion of the ETF was actually paid; and a " 'Subscriber Class,' " defined as all persons in the United States who were or are parties to a contract for a wireless telephone personal account with Verizon Wireless and its legacy companies that included or includes a provision for a flat-rate ETF from July 23, 1999, through the effective date of the publication notice.

The Settlement Terms

The settlement terms require Verizon to pay $21 million to a fund for the benefit of the national settlement classes, without reversion of any amounts to Verizon. Class members who paid one or more flat-rate ETF's will receive full credit as an "Allowed Claim" for amounts which the claims administrator verifies as paid based on a review of Verizon's records. The money will be distributed pro rata on each Allowed Claim in proportion to the total number of such claims to the extent that there are insufficient funds to pay all claims in full. Class members who claim that they paid a flat-rate ETF but are unable to offer any proof of such payment will receive an Allowed Claim of $25, as will class members who allege that they suffered harm as a result of having been charged a flat-rate ETF that they did not pay. The settlement further prohibits Verizon

[7] Pursuant to the terms of the settlement, the parties stipulated to the filing of a Fourth Consolidated Amended Complaint encompassing the expanded class claims.

from including a flat-rate ETF in any new customer agreements for a wireless service personal account in the United States for a period of two years.

Settlement of Related Proceedings

The settlement includes a release of the settlement classes' ETF claims against Verizon, including the claims asserted in three other pending actions.

The *Brown* Arbitration

Brown v. Cellco Partnership (Cir. Ct. Palm Beach County, Fla., complaint filed May 17, 2004, No. 50 2004CA005063MB-AI) (*Brown*) is an action asserting both ETF and handset locking claims against Verizon.[8] The lead plaintiff, Brown, filed a demand for class arbitration with the AAA. The AAA granted Brown's motion to certify two 49-state classes (excluding persons with a California area code and California billing address): (1) a "Payer Class: All persons in the United States who were charged an [ETF] pursuant to a [Verizon] Customer Service Agreement which contained an arbitration clause from November 1, 2000 through November 16, 2006 . . ."; and (2) a "Subscriber Class: All persons in the United States who were parties to a contract for a wireless telephone personal account with Verizon that included a provision for an [ETF] and included an arbitration clause from November 1, 2000 through November 16, 2006 . . . ." Two of the class representatives from *Brown*, Brown and Schroer, joined with the *White* plaintiffs to represent the nationwide settlement classes.[9]

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8 We grant Verizon's October 26, 2009 unopposed request that we take judicial notice of a Class Determination Award by the arbitrator in the *Brown* arbitration and a subsequent correction and amendment of that order. We deny Verizon's concurrent request that we take judicial notice of an order in *Schneider v. Verizon Internet Services, Inc.* (C.D.Cal., 2009, No. CV 08-07856 R CWx) dismissing ETF claims similar to those raised here under Federal Rules of Civil Procedure, rule 12(b)(6). This order was not before the trial court and is irrelevant to the issues before us.

[9] One of the lead trial counsel for the class here also served as the designated lead counsel in the *Brown* arbitration.

The *Waudby* Litigation

Waudby v. Verizon Wireless (D.N.J., complaint filed Jan. 26, 2007, No. 07-0470) (*Waudby*) asserted essentially the same claims then pending in the *Brown* arbitration and sought to certify a nationwide class.[10] The arbitrator in *Brown* granted a motion to enjoin the *Waudby* litigation in March 2008.

The *Gentry* Litigation

Gentry v. Cellco Partnership (C.D.Cal., complaint filed Nov. 4, 2005, No. CV-05-07888) asserted similar ETF claims against Verizon. The case was stayed on March 22, 2006, on Verizon's motion pending resolution of ETF proceedings before the Federal Communications Commission (FCC).

The Settlement Notices

The Stipulation and Agreement of Settlement provided for notice to the classes in three forms: (1) a mail notice to be sent to the last known addresses of the ETF Assessed Class; (2) a one page short-form publication notice for publication in print media; and (3) a more detailed long-form publication notice for posting on an internet referral site. Following preliminary approval of the settlement, including the forms of notice, the trial judge made a further sua sponte review of the form of class notice proposed in the settlement and held a subsequent hearing on July 15, 2008. As a result of that hearing the court issued an order requiring the parties to redraft the notices "with the goal of making it easy to understand for non-lawyers" and to make certain that the notice clearly explained the rights and obligations of class members in connection with the settlement. The court sought to "ensure that the notice provides absent class members with a clear picture of not only what the settlement provides, but also what it does not provide and whether it changes any existing contractual relationships between Verizon and absent class members." The parties submitted revised notices, which were approved by the court subject to some additional changes. The approved mail notice was mailed by the

[10] Plaintiffs/respondents contend that the pleading allegations in the *Brown* case were copied verbatim into the *Waudby* complaint by appellant Zobrist's former counsel.

appointed settlement administrator to 2,771,109 identified ETF Assessed Class members[11] and the short-form publication notice was published in 17 newspapers nationally, including the Wall Street Journal, the New York Times, the Chicago Tribune, and USA Today. The parties established a Web site[12] where class members could view, among other documents, the long-form publication notice, the complaint, settlement agreement and plan of allocation, and could obtain answers to frequently asked questions (FAQ's). The Web site also allowed class members to file a claim form electronically. In addition, the settlement administrator established a toll-free telephone number to listen to FAQ's in English and in Spanish, request a claim form, or request to speak to a live operator about the settlement.

Response to the Notice

As of October 14, 2008, 154,992 class members had submitted claims, either electronically or in paper form. One hundred twenty-nine class members had opted out of the settlement. Eight objections were filed with the court on behalf of 11 individuals. Based on the number of claims, and after deduction of the costs of notice and attorney fees, each Allowed Claim will be paid at approximately 50 percent of the amount claimed. A class member who paid a $175 ETF will therefore receive approximately $87.50 under the terms of the settlement.

The Objectors

Appellants Dawn Zobrist and Danie van den Berg (collectively Zobrist) and Ann and John Talley (Talley) are four individuals who objected to approval of the settlement. Dawn Zobrist was a member of the ETF Assessed Class, having paid a $175 ETF " 'under protest' " in March 2002. (*Zobrist v. Verizon Wireless* (Ill.App. 5th Dist. 2004)

[11] Of the mail notices returned to the Settlement Administrator, 13,032 were remailed to updated addresses and 196,027 were designated by the post office as undeliverable.

[12] www.VerizonETFSettlement.com

822 N.E.2d 531, 535 (*Zobrist*).)[13] Danie van den Berg was a member of the Subscriber Class who entered into a two-year Verizon contract subject to the flat-rate ETF, but did not pay a fee.[14] The Talleys alleged that they were members of the Subscriber Class, filed written objections, and appeared at the approval hearing to argue the objections.[15] Zobrist filed written objections to the settlement, appeared at the approval hearing, and was subsequently given leave to file a complaint in intervention.

On October 21, 2008, a hearing was held before Judge Bonnie Sabraw on plaintiffs' motion for final approval of the settlement. In an order dated November 6, 2008, Judge Sabraw considered and overruled the objections and granted final approval to the settlement, finding that "the total monetary and injunctive relief obtained is reasonable in light of the claims released and the risks of further litigation."[16] An amended order, correcting what the court termed "an inadvertent discrepancy between the Court's reasoning and the Court's order," but making no other changes, was filed on December 5, 2008.

Zobrist challenges the sufficiency of the notice to the class, alleging that it was both false and inadequate. She contends that the trial court abused its discretion in approving a settlement that was not fair, reasonable and adequate, asserting that the court

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[13] Zobrist filed an action against Verizon on August 9, 2002 (*Zobrist v. Verizon Wireless* (Cir. Ct. Madison County, Ill., No. 02-L-1088)). Zobrist asserted ETF claims against Verizon on behalf of a putative Illinois class of Verizon customers. In 2004, an Illinois appellate court granted Verizon's motion to compel arbitration. (*Zobrist, supra,* 822 N.E.2d at p. 543.) The *Zobrist* case was subsequently consolidated with the *Brown* arbitration. Appellants refer to the consolidated *Brown* proceeding as the "*Zobrist* arbitration."

[14] Danie van den Berg's declaration states that his wife was erroneously assessed an ETF following termination of one of three telephone lines at the end of the contract term, but that the assessment was reversed by Verizon after protest.

[15] The Talleys' opening brief simply joins in and adopts the Zobrist brief, without any reference to any portion of the record or citation of authority.

[16] The court also awarded fees to class counsel in the amount of $6,349,788.65 plus $1,000,211.35 in costs and expenses. The appellants did not challenge below, and do not challenge here, the court's award of fees and costs.

grossly underestimated the size of the class, and therefore overestimated the value of the common fund, and that the Subscriber Class was improperly denied monetary compensation. She further alleges that class counsel and the named class representatives breached their fiduciary duty to the class in obtaining unreasonable and excess incentive payments for the representatives. We reject each of these contentions.

II. DISCUSSION

A. *Standard of Review*

In a class action, the trial court has "broad discretion" to determine "whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*).) "Our review is therefore limited to a determination whether the record shows 'a clear abuse of discretion.' " (*Id*. at p. 235, quoting *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1802 (*Dunk*); see also *In re Microsoft I–V Cases* (2006) 135 Cal.App.4th 706, 723.)

In reviewing the fairness of a class action settlement, " '[d]ue regard' . . . 'should be given to what is otherwise a private consensual agreement between the parties. The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." [Citation.]' . . ." (*7-Eleven Owners for Fair Franchising v. Southland Corp*. (2000) 85 Cal.App.4th 1135, 1145 (*7-Eleven*), quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801.)

In considering whether a settlement is reasonable, the trial court should consider relevant factors, which may include, but are not limited to " 'the strength of [the] plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.' " (*Kullar v. Foot Locker Retail, Inc.* (2008)

168 Cal.App.4th 116, 128 (*Kullar*), quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801; see also *In re Microsoft I-V Cases, supra*, 135 Cal.App.4th at p. 723.) A " 'presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.' " (*Kullar*, at p. 128, quoting *Dunk*, at p. 1802; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 52–53.)

B. *Adequacy of the Settlement Notice*

On settlement of a class action, "notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (Rule 3.769(f).)

The rules specify the content of the notice to class members and the factors the court must consider in determining the manner of notice. Rule 3.766(d) provides in pertinent part: "The content of the class notice is subject to court approval. If class members are to be given the right to request exclusion from the class, the notice must include the following: [¶] (1) A brief explanation of the case, including the basic contentions or denials of the parties; [¶] (2) A statement that the court will exclude the member from the class if the member so requests by a specified date; [¶] (3) A procedure for the member to follow in requesting exclusion from the class; [¶] (4) A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and [¶] (5) A statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel."

The trial court " 'has virtually complete discretion as to the manner of giving notice to class members.' [Citation.]" (*7-Eleven, supra*, 85 Cal.App.4th at p. 1164.) Zobrist does not directly challenge the *manner* in which notice was disseminated, but rather contests the content of the notices. While our review of the manner of giving notice is governed by the abuse of discretion standard, our review of the content of notice

may be de novo. " 'To the extent the trial court's ruling is based on assertedly improper criteria or incorrect legal assumptions, we review those questions de novo.' " (*Cho v. Seagate Technology Holdings, Inc.*, (2009) 177 Cal.App.4th 734, 745, quoting *Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1537 (*Hypertouch*); see also *Wershba, supra*, 91 Cal.App.4th at pp. 234–235.)

The record below reflects that the trial judge carefully reviewed the forms of notice proposed by the parties, and required revisions "with the goal of making it easy to understand for non-lawyers" and to make certain that the notice clearly explained the rights and obligations of class members in connection with the settlement. Zobrist contends that the form of notice provided to class members was nevertheless inadequate because the notices allegedly misled members of the Subscriber Class into believing that they were "eligible to make claims for any part of the Common Fund," and also because the notices allegedly did not disclose the "size of the class."[17]

She first argues that the statement in the short-form publication notice that the "settlement will provide $21 million into a Common Fund for claims of subscribers who were charged, paid and/or were subject to a flat-rate ETF," misled members of the Subscriber Class into believing that they "could share in a portion of the $21 million." That publication notice, however, (as well as the mail notice) directed potential settlement class members to the settlement Web site to learn more about the settlement, and the publication notice specifically referenced the "detailed notice and claim form package" which subscribers would need to submit to "qualify for a payment." The settlement Web site included the " 'Plan of Allocation,' " detailing how payments would

[17] Zobrist also objects that the short-form publication notice failed to disclose to the members of the Subscriber Class that they were members of the class certified in the *Brown* arbitration in New York. The long-form publication notice, however, specifically stated that the settlement would resolve the claims asserted in the *Brown* arbitration: "The settlement will also resolve other pending cases that challenge Verizon Wireless's flat-rate ETF, including *Brown, Zobrist & Cellco Partnership d/b/a Verizon Wireless*, [AAA], Case Nos. 11 494 01274 05 and 11 494 0032 05, pending before the [AAA] in New York, New York. . . ."

be made to class members, including the fact that members of the Subscriber Class were only entitled to the injunctive relief described in the settlement, at three different places linked to on the site's homepage: the long-form publication notice (in English and Spanish); the Plan of Allocation of settlement proceedings pleading; and FAQ's (in English and Spanish). The long-form publication notice, for example, states that payments will be made "on a pro rata basis to class members who paid an ETF and payment to class members that were charged but did not pay an ETF and prove that they suffered economic harm as a result of the ETF." The claim form provided electronically on the Web site and in physical form to class members also made clear that subscribers who were not charged an ETF were not eligible to claim monetary relief. The claim form requires that individuals identify themselves as a customer who "paid a flat [ETF]," or who "was charged but did not pay a flat [ETF]." The form does not include a box that can be checked by past or present subscribers who were or are merely subject to a flat-rate ETF but not charged an ETF. Zobrist does not contest the adequacy of the information provided on the Web site. That the Web site was effective as a primary detailed source of information about the litigation and the settlement is evidenced by the fact that the overwhelming majority of claims filed with the settlement administrator (111,992 out of the total of 154,992) were submitted electronically.

Significantly, Zobrist fails to cite any evidence that any class members were actually deceived or misled by the notice, or that anyone inappropriately submitted a claim for monetary relief as a consequence of confusion or misunderstanding. The notices as a whole, including information provided on the settlement Web site and in the claim form, make clear that monetary relief is limited to members of the ETF Assessed Class.

A similar procedure for notice of a class settlement, utilizing a summary notice directing class members to a Web site containing more detailed notice, was approved in *Chavez* as a "perfectly acceptable" manner of giving notice. (*Chavez, supra,* 162 Cal.App.4th at p. 58.) We agree with the observation in *Chavez* that "[u]sing the capability of the Internet in [this] fashion was a sensible and efficient way of providing

notice, especially compared to the alternative [objector] apparently preferred—mailing out a lengthy legalistic document that few class members would have been able to plow through." (*Id.* at p. 58, fn. omitted.) We do not look for perfection. "[A] large body of case law reflect[s] the view that 'the whole concept of a large class-action might easily be stultified by insistence upon perfection in actual notice to class-members . . . .' [Citation.]" (*Hypertouch, supra,* 128 Cal.App.4th at p. 1540.)

Zobrist also argues that notice was defective in failing to disclose the "enormous size" of the class to the EFT Assessed Class. She contends that this did not provide the class members with adequate information for the members to make an informed decision about whether to participate, object, or opt out. She cites no authority for her position that information as to the size of the potential class, or the contingencies of recovery in any particular amount, is required. Courts which have considered such objections in the context of class settlement have rejected the claim.[18] "[T]here is no requirement that the class size be specified in the notice [citations] . . . ." (*In re Lorazepam & Clorazepate Antitrust Litigation* (D.D.C. 2002) 205 F.R.D. 369, 379; see also *In re Insurance Brokerage Antitrust Litigation* (D.N.J., Feb. 16, 2007, MDL No. 1663, No. 04-5184(FSH)) 2007 U.S. Dist. LEXIS 11163 [nonpub. opn.] [rejecting objection to notice that it "do[es] not provide details about the size of the class and the actual individual settlement values"]; *In re: Managed Care Litigation; Class Plaintiffs v. Aetna Inc.* (S.D.Fla., Oct. 24, 2003, MDL No. 1334, No. 00-1334-MD-Moreno) 2003 U.S. Dist. LEXIS 27228 [nonpub. opn.] [rejecting objection to notice that there was "no way to calculate the actual value of the settlement as to each class member since no estimate of size of class was provided"].)

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[18] " 'California courts may look to federal authority for guidance on matters involving class action procedures.' [Citations.]" (*Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1264, fn. 4.) "[W]hen there is no relevant California precedent on point [regarding attorney fees in class actions] federal precedent should be consulted. [Citation.]" (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 38 (*Lealao*).)

Both the mail notice and the long-form publication notice identified the total amount of the common fund recovery, the nature of the costs and fees to be deducted from the common fund, and the fact that the balance of the fund would be allocated among qualified class claims. The long-form publication notice makes clear that "[t]he amount paid to class members may be larger or smaller than the amount of the claim, depending on how many claims are submitted." "The aggregate amount available to all claimants was specified and the formula for determining one's recovery was given. Nothing more specific is needed. [Citation.]" (*Marshall v. Holiday Magic, Inc*. (9th Cir. 1977) 550 F.2d 1173, 1178.)

The trial court did not abuse its discretion in the manner of giving notice and the content of the notices was adequate to " ' "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." [Citations.]' [Citation.]" (*7-Eleven, supra*, 85 Cal.App.4th at p. 1164.)

C. *Fairness*

Zobrist argues that the settlement is unfair and inadequate in several respects. She alleges the pro rata monetary recovery to the ETF Assessed Class is insufficient and "irrationally and unfairly" discriminates between those class members who actually paid an ETF and those who had only been assessed an ETF and declined to pay it. In assessing the value of the settlement to the class, Zobrist asserts that the court "misunderstood essential facts" and incorrectly believed the ETF Assessed Class to be "only a fraction of its true size." She contests the failure of the settlement to provide any monetary relief for the Subscriber Class.

She challenges the releases contemplated by the settlement as "one-sided," waiving all challenges by class members to the assessment or collection of flat-rate ETF's, while allowing Verizon to pursue collection of unpaid ETF's. She contends that the stipulated injunctive relief was "meaningless."

The trial judge here was intimately familiar with the factual and legal issues presented in the ETF litigation. She had considered and ruled upon all pretrial motions in

both the *Sprint* and *Verizon* ETF cases, had served as the trial judge in the related *Sprint* ETF trial, and had heard all of the plaintiffs' evidence in this case before the settlement was reached midtrial. She found the settlement terms to be reasonable and adequate. "Our task is limited to a review of the record to determine whether it discloses a clear abuse of discretion when the trial court's determination of fairness is challenged on appeal. We do not substitute our notions of fairness for those of the trial court or the parties to the agreement. [Citation.] 'To merit reversal, both an abuse of discretion by the trial court must be "clear" and the demonstration of it on appeal "strong." ' " (*In re Microsoft I-V Cases, supra,* 135 Cal.App.4th at p. 723, quoting *7-Eleven, supra,* 85 Cal.App.4th at p. 1146.)

The settlement agreement here met the *Kullar* requirements, entitling it to a "presumption of fairness." (*Kullar, supra,* 168 Cal.App.4th at p. 128, citing *Dunk, supra,* 48 Cal.App.4th at p. 1802.) Experienced class litigation counsel negotiated the settlement in arms-length bargaining. The settlement was reached after five years of litigation, including extensive investigation and discovery, and after trial of a related ETF case to jury verdict. Only a very small percentage of the class members objected.[19]

The court considered the objections presented and conducted an extended and thorough analysis of the fairness of the settlement. The trial judge found the total monetary and injunctive relief to be reasonable in light of the claims released and the risks of further litigation.

1. The Size of the ETF Assessed Class

Zobrist contends that the superior court "fundamentally misunderstood the size of the ETF Assessed Class" when assessing the adequacy of the monetary relief provided by the settlement. She argues that the court erroneously determined the ETF Assessed Class to consist only of roughly 2.7 million members, when the true figure was approximately 23 million customers. White and her fellow plaintiffs/respondents dispute this. They

[19] As we have already concluded, notice to the potential class members was adequate—129 class members opted out of the settlement and only eight objections were filed with the court.

correctly point out that there was no evidence presented to support the larger figure that Zobrist advocates, and that she cites only her own Notice of Objection and Intention to Appear at Hearing as support for this number.

The exact size of the ETF Assessed Class was a disputed issue in the litigation. The court, in its order granting final approval of the settlement, referred to "the 2.7 million person ETF Assessed Class," but this comment was made in the approval of the Plan of Allocation, not the adequacy of the settlement. The reference was to the number of individuals who received the mailed notice, based on available Verizon records. The court was aware that the ETF Assessed Class included persons who did not receive the mail notice due to the unavailability of current addresses for persons assessed ETF's before 2004. In the final approval order, the court found that the total potential monetary recovery for plaintiffs' ETF claims on a nationwide basis would be $1 billion or more. Assuming a potential recovery of $1 billion, which is the amount Verizon and plaintiffs agreed was collected by Verizon during the class period, and dividing that sum by the amount of Verizon's flat-rate ETF ($175) would yield a result of about 5.7 million potential claimants.[20] The record does not support Zobrist's assertion that the trial judge misapprehended the size of the monetary recovery class.

It is also well settled that the court's obligation is only to be "aware of the maximum damages" claimed by the class, discounted by the risks that the class would not obtain such relief, and then to compare those claims to the value of the relief class members would receive under the settlement. (*Kullar, supra*, 168 Cal.App.4th at p. 130, citing *Dunk, supra*, 48 Cal.App.4th at p. 1802.)[21] The trial judge made that analysis,

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[20] At trial the parties stipulated that Verizon's collection rate in California on the ETF's was approximately 1 out of every 2.5 flat-rate ETF's assessed. Extrapolating that figure nationally would yield an approximate total ETF assessment number of roughly $2.5 billion, and 14.3 million customers assessed. Zobrist's claim of 23 million ETF Assessed Class members appears to have been based on an extrapolation of Sprint's collection rate of 1 in 3 ETF assessments.

[21] Zobrist's citation from *State of California v. Levi Strauss & Co* (1986) 41 Cal.3d 460, 482, that "class size is of the essence in determining the compensatory

weighing the actual compensation from the common fund against the potential class recovery. The court recognized that after payment of fees, legal costs, notice costs, and administrative costs, each claimant would receive approximately 50 percent of each claim submitted; thus, a $175 claim for payment of an ETF would result in payment of approximately $87.50. (*Ibid*.)

2. Lack of Monetary Compensation to the Subscriber Class

With respect to the objection to lack of monetary compensation for members of the Subscriber Class, the court noted the weakness of those class members' claims, observing that the Subscriber Class had no claim for monetary relief for ETF's either assessed or paid and therefore had no claim for any "out-of-pocket damages." The only "potential claim for monetary relief" for those Verizon customers would be that the ETF "coerced" them into "complying with their contractual obligations," a "tenuous claim." Plaintiffs expressly eschewed any claim for monetary relief during the class certification proceedings.[22]

The court also found value to the class in Verizon's decision to change its flat-rate ETF policy and in the stipulated injunctive relief, stating that a "reasonable inference" could be drawn that "this lawsuit and the related lawsuits against Verizon were in some measure catalysts for Verizon's decision to adopt a pro-rated ETF for contracts starting on and after November 17, 2006," that this "change in policy has provided a substantial benefit to many of the class members and will provide substantial monetary benefits to Verizon customers in the future," that this "ensures that for a period of two years Verizon will not revert to a flat ETF," and that this "will keep in place the benefits obtained in the litigation." Plaintiffs submitted evidence estimating that the prorated ETF would save consumers $96 million in 2009 alone. An additional two years of a prorated ETF under

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effectiveness of a claimant fund sharing plan" is from a concurring opinion and is not part of the majority holding in that case.

[22] The same trial judge ultimately held in the *Sprint* case that class members who did not actually pay the ETF were not entitled to *any* monetary recovery.

the settlement's injunction would have a potential monetary value to class members of over $180 million.

3. Plaintiffs' Risks of Trial

The court further found that the objections to the settlement did "not sufficiently account for the risks related to the continued prosecution of this case." The court noted "significant risks" as to whether plaintiffs could prevail on the merits of their claims, observing that it was "unclear" whether plaintiffs could "prove that the ETF was unlawful" under Civil Code section 1671, subdivision (d), particularly given the existence of competing articulations of the judicially-created "reasonable endeavor" test. Further, it was unclear whether "the ETF operated as an alternative means of performance for those class members who elected to terminate their contracts early and to pay the ETF."[23] (*Ibid.*) Even if the ETF was found to be unlawful, there still existed the possibility that "the monetary relief that [p]laintiffs would recover on their claims might be less than the monetary relief that Verizon might prove on its cross-claims,[24] which could result in a net judgment of $0.00 for the class."

There were "significant risks to the class members" in continuing to prosecute the case "even if [p]laintiffs prevailed at the trial court." It was unclear whether the "ETF claims are a matter of federal law" under the Federal Communications Act of 1934 (FCA) (47 U.S.C. § 332(c)(3)(A)), and thus preempted. The court noted that the FCC was still "considering whether the ETF claims are a matter of federal law" and "could issue its decision at any time,"[25] as well as the "possibility of appellate proceedings" and

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[23] The trial judge later found in a statement of decision on the court trial portion of the *Ayyad v. Sprint* (Super. Ct. Alameda County, 2008, RG03-121510) case that the Sprint ETF was invalid. An appeal from that decision is pending.

[24] Verizon filed a cross-complaint for breach of contract and unjust enrichment against Molly White and the unnamed class members.

[25] A formal administrative proceeding had been pending at the FCC since May 2005, to determine the extent to which 47 United States Code section 332(c)(3)(A) of the FCA preempts state court actions that challenge ETF's.

a "remand to the trial court for further proceedings," which could "delay any final resolution for a few years." (*Ibid.*) The court emphasized that "[e]ach of these was a very significant issue and at the time of settlement it was by no means clear that [p]laintiffs would prevail on all the issues."

Zobrist points to the jury verdict of $73,775,975 in refunds and ETF cancellations returned against Sprint in the trial that immediately preceded the Verizon trial (tried by the same plaintiffs' class counsel) as evidence of the inadequacy of the settlement. She contrasts that with the amount of the common fund here and labels it a "shocking" disparity. She ignores, however, the verdict returned by the same jury on Sprint's cross-complaint, finding that the plaintiffs had breached their contracts with Sprint, and determining Sprint's actual damages caused by early termination of the contracts to be $225,697,433. Under the setoff procedure provided in Judge Ronald Sabraw's 2006 pretrial order, the plaintiffs' net recovery in the Sprint trial was *zero*. While the trial court subsequently granted a new trial on the issue of Sprint's damages, and the resulting offset, Sprint has appealed this order, and plaintiffs here faced the same risk of pyrrhic victory.

4. Allocation Among Members of the ETF Assessed Class

The Plan of Allocation permits class members who have actually paid an ETF to claim full reimbursement, while those class members who have not paid are permitted only a $25 claim and "will likely receive no more than $13.00 in total." Zobrist contends that this differential treatment is "irrational[]" and "manifestly unfair." She argues that this is particularly so when Verizon is permitted to continue to pursue collection of unpaid ETF's, while class members' claims are released. As Verizon notes, however, Zobrist presented no evidence of any ongoing collection efforts against any class member, or that the majority of such claims were not already time barred at the time of the settlement.[26] Any class member perceiving a risk of collection action by Verizon still

[26] On November 17, 2006, Verizon adopted a prorated ETF in its subscriber agreements on a prospective basis.

had the ability to opt out of the settlement. More to the point, Zobrist fails to show how those who have paid nothing would be able to establish, particularly on a class basis, that they would be entitled to restitution, or that they have suffered compensable damages in any amount. The trial court found that the Plan of Allocation "reasonably allocates the monetary relief among the members of the ETF Assessed Class and the Subscriber Class in proportion to the injuries that the members of those classes have allegedly suffered." The court was well within its discretion in approving a Plan of Allocation awarding greater relief to those with documented out-of-pocket losses than those who suffered only intangible injury.

D. *Alleged Breach of Fiduciary Duty and the Incentive Payments*

The court approved incentive awards in the amount of $10,000 each to class representatives, White, Schroer, Brown and Nguyen. Zobrist argues that the class representatives breached their fiduciary duties to the class by receiving the incentive awards and that they sought " 'individual gain' " at the expense of the class. She does not dispute the extent of the participation of the class representatives in the litigation, but rather focuses on the disparity between the amount of the awards and the recovery by individual class members. She alleges that Schroer and White received amounts grossly disproportionate to the average recovery to the ETF Assessed Class, and asserts that Nguyen and Brown (members of the Subscriber Class) received "pay-offs to induce them to sell out the Subscriber Class."

While there has been scholarly debate about the propriety of individual awards to named plaintiffs, "[i]ncentive *awards* are fairly typical in class action cases." (*Rodriguez v. West Publishing Corp*. (9th Cir. 2009) 563 F.3d 948, 958 (*Rodriguez*), citing 4 Newberg on Class Actions (4th ed. 2002) § 11:38, p. 81; Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study* (2006) 53 UCLA L.Rev. 1303.) These awards "are discretionary, [citation], and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to

recognize their willingness to act as a private attorney general." (*Rodriguez*, at pp. 958-958.)

There is a surprising dearth of California authority directly addressing this question. The threshold question of whether a class representative is entitled to a fee in a California class action was recently answered in the affirmative in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785 (*Clark*). (See also *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726 [affirming without discussion an order for " 'service payments' to the five named plaintiffs compensating them for their efforts in bringing the action"]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 14:146.10, p. 14-88.) " 'Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable.' " (*Clark*, at p. 804, fn. omitted, citing *Matter of Continental Illinois Securities Litigation* (7th Cir. 1992) 962 F.2d 566, 571 (*Continental Illinois*).) *Clark* involved allegations of unpaid wages and overtime, failure to provide meal and rest periods, and other labor violations. (*Id.* at p. 789.) The court reversed the trial court's approval of the settlement on the principal ground that "the court did not receive and consider sufficient information on a core legal issue, affecting the strength of the case for plaintiffs on the merits." (*Ibid.*) Although approving the concept of incentive awards generally, the court also reversed the trial court's approval of enhancements of $25,000 to each of the two named plaintiffs on the basis that no rationale was provided to show that an award of this sum was fair and reasonable. (*Id.* at pp. 805–806.)

"[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Clark*, *supra*, 175 Cal.App.4th at p. 806.) An incentive award is appropriate " 'if it is necessary to induce an individual to participate in the suit.' [Citation.]" (*Id.* at p. 804.) "[C]riteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class

representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. [Citation.]" (*Van Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294, 299.) These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit. (See *Dornberger v. Metropolitan Life Ins. Co.* (S.D.N.Y. 2001) 203 F.R.D. 118, 124–125.)

The court here received evidence that each of the class representatives actively participated in the litigation and worked with class counsel to assist in the prosecution of the litigation. White "produced documents, answered interrogatories and submitted to a deposition. [S]he testified at trial as a witness for plaintiffs. She also traveled across the country from her home in Portland, Oregon to testify at the June 12, 2008 hearing" before the FCC regarding ETF's. Schroer, a claimant in the *Brown* arbitration, "produced documents, answered interrogatories, submitted to a deposition and participated in conferences with counsel to prepare for trial and to discuss trial strategy for the *Brown* matter." Schroer also "personally attended three days of evidentiary hearings in the *Brown* matter, flew across the country from his home in New York to testify at trial in California as a witness for plaintiffs in the *White* action, and traveled to Washington, D.C. to testify before the FCC at the June 12, 2008 public hearing regarding . . . ETF's." Brown, also a claimant in the *Brown* arbitration, "produced documents, answered interrogatories and traveled from Florida to New York City to give deposition testimony in the *Brown* matter. Brown also participated in conferences with counsel to prepare for trial and to discuss trial strategy for the *Brown* matter." Nguyen "produced documents, answered interrogatories and gave deposition testimony." Counsel noted that Nguyen's willingness to participate in a deposition was "significant because she cleans houses for a living."

In contrast to the more detailed analysis given by the trial court to other aspects of the settlement, the discussion of the incentive awards was sparse. There is no "presumption of fairness" in review of an incentive fee award. (*Clark, supra*, 175 Cal.App.4th at p. 806.) The court, however, found the awards justified in light of the total settlement on the "substantial benefit/common fund approach" and the "material support" provided by the named plaintiffs to the prosecution of the case. Given the familiarity of the trial court with the history of the lengthy litigation and the evidence before the court that the representatives had, over the course of the litigation, assisted with investigation, responded to discovery requests, reviewed documents and pleadings, and testified either in deposition or at trial, we find no abuse of discretion in these awards.

III. DISPOSITION

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.